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No. 94-1332

In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents Northwest Forest Resource Council ("NFRC"), Intermountain Forest Industry Association ("IFIA"), Ellingson Lumber Co., Robert Messinger and County of Wallowa, Oregon (hereafter collectively referred to as "Intervenors"),[1] defendants-intervenors-appellees

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[1] None of the respondents has any parent, subsidiary or affiliated corporation.

below, submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of Jack Ward Thomas, Chief, United States Forest Service, et al.[2]

STATEMENT OF THE CASE

Intervenors adopt the Statement of the Case set forth in the petition, with the following supplemental statement:

A. Description of the intervenors.

NFRC is a not-for-profit Oregon corporation that represents associations and companies in the forest products industry in Oregon and Washington. C.R. 16. Its member associations serve several hundred companies in every segment of the forest products industry in the two-state region, from independent loggers and small sawmills to large vertically-integrated manufacturers. NFRC actively works to maintain the health and productivity of national forests in Oregon and Washington.[3]

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[2] Intervenors received the Solicitor General's petition on February 6, 1995. Under Sup. Ct. R. 12.4 this response is being filed within 20 days after the date of receipt of the petition.

[3] NFRC also initiates and participates in legal actions which may influence the volume and availability of federal timber from the national forests in Oregon and Washington, and from lands managed by the Bureau of Land Management in Oregon. *See, e.g., Robertson v. Seattle Audubon Society*, -- U.S. --, 112 S. Ct. 1407 (1992) (defendant-intervenor); *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994).

IFIA, a nonprofit Idaho corporation, is a trade association representing some 50 Idaho and Montana companies engaged in logging and manufacturing wood products. C.R. 16.

Ellingson Lumber Co. is a lumber manufacturer that employs 175 workers at its sawmill located in Baker City, Oregon. Ellingson has historically obtained 85 percent of its timber supply from the national forests in eastern Oregon and Idaho. C.R. 16.

Robert Messinger lives in the small town of Summerville, Oregon in the eastern part of the state. He hikes, camps, observes wildlife and hunts on national forest lands in Oregon including the Wallowa-Whitman and Umatilla national forests. C.R. 16.

The County of Wallowa, Oregon is a political subdivision of the state of Oregon headed by a three-person County Court. Sixty-three percent of the county's land base lies within national forest lands, including the Wallowa-Whitman and Umatilla national forests. C.R. 16. Historically, 40 percent of the county's budget has been supplied by Forest Service timber sale receipt payments. Grazing on national forest lands also contributes substantially to the county's economic base. The County has a strong interest in maintaining the health and productivity of the national forests within its boundaries.

B. Intervenors' participation below.

Shortly after the case was filed in district court in Oregon, the Intervenors obtained leave to intervene as defendants to oppose the relief sought by plaintiff Pacific Rivers Council. C.R. 26.

Intervenors' position was that the injunction requested by Pacific Rivers Council should be denied because it would cause more harm than good to the protected salmon stocks. The silvicultural (logging and road construction) projects at issue on the two forests had been designed in large measure to avoid catastrophic wildfires on the two national forests, and to help restore the failing ecological health of the forests that is threatened by drought, disease pathogens and infestation of defoliating insects. Intervenors contended that the requested injunctive relief would harm the forests and the fish by blocking these needed remedial projects.

Intervenors submitted testimony in the district court from Dr. Gregory M. Filip, a professor of ecology at Oregon State University, that a one to two year halt to pending timber and road projects on the Umatilla and Wallowa-Whitman national forests would increase the risk of further pest-caused tree mortality, wildfire incidence and general forest health decline, and would also adversely affect salmon habitat on the two forests. C.R. 105. Halting silvicultural projects would increase pest-caused tree mortality in riparian areas, producing loss of stream shading and increased water temperatures that are harmful to spawning salmon. Any catastrophic fire would cause tremendous erosion and degradation of fish spawning and rearing habitat. *Id.*

Intervenors also submitted testimony from wildfire expert Richard E. Montague, a retired Forest Service fire protection manager, that the current catastrophic fire risk on the Umatilla and Wallowa-Whitman national forests is very high, that the risk will increase if current silvicultural projects are delayed, that wildfires cause detrimental effects to salmon

fisheries, and that avoiding wildfires through silvicultural management helps protect salmon stocks. C.R. 104.

The district court never addressed this testimony since it held that it could not weigh the balance of harms in awarding injunctive relief once it found a procedural violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.* App. 42a.[4] The Ninth Circuit likewise never reached the balance of harms, enjoining the projects based solely on the Forest Service's finding that they "may affect" the protected salmon. App. 15a. The Ninth Circuit also stated that "timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period." App. 16a, citing *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

C. The importance of the Forest Service timber sale program.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. The Multiple-Use Sustained-Yield Act of 1960 recognizes timber as one of the five mandated resource outputs of the national forests. 16 U.S.C. § 528. For almost a century the national forests have served as an important source of timber supply for the American people. Most timber sales also contribute to the ecological health of

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[4] References to "App. --" refer to the appendix attached to the Solicitor General's petition.

the forest by removing decadent or diseased trees to allow new growth by healthy young trees.

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[5] Every million board feet of timber sold by the Forest Service creates approximately nine full-time manufacturing jobs for one year.[6]

Forest Service and other federal timber provides more than one-third of all timber harvested in the Pacific Northwest,[7] a greater proportion than in other parts of the country. As a result, a large component of the forest products industry in the Pacific Northwest owns no private timber and depends largely or completely on purchases of federal timber to supply their mills. Many of these federally-dependent mills are small, family-owned businesses like Ellingson Lumber Co. which have supported timber-dependent communities for decades based almost entirely on timber sold by the Forest Service.

D. Harmful impacts of the Ninth Circuit's order.

The Ninth Circuit decision in this case has frustrated the purposes of the forest management laws, and imperiled the health of the forests, by blocking the operation of existing and planned timber sale contracts designed to achieve

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[5] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990* (1990) ("*Production, Prices*"), Table 20.

[6] *Id.*, Table 15, Table 20.

[7] *Id.*, Table 74.

Congressionally approved and environmentally desirable forest management goals.

Immediately following the Ninth Circuit decision, the Forest Service reinitiated section 7 consultation on the two forest plans and administratively halted operations on more than a dozen previously-awarded, enforceable timber sale contracts among some 300 pending projects it suspended on the two forests. App. 49a. Each of these contracts typically has a value well in excess of one million dollars.

On October 20, 1994 the district court on remand enjoined operations on all these timber sales (except certain very limited operations that were exempted by agreement of Pacific Rivers Council, App. 51a at n.3) until completion of the plan consultations. App. 60a.

The effect of the Ninth Circuit decision was to put loggers and truckers out of work immediately and to threaten the raw material supply for the mills that were relying on the timber from these contracts.

Although the ESA requires section 7 consultations to be completed within 90 days, 16 U.S.C. § 1536(b), the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") rarely meet the statutory deadline. As the petition notes, most of the consultations initiated by the Forest Service when the Snake River salmon stocks were listed in 1992 still have not been completed -- almost three years later. Petition at 7-9 and n.6.

The plan consultations ordered by the Ninth Circuit are no exception. Initiated August 3, 1994, neither consultation was completed as of late February, 1995.[8]

Federal agencies treat the section 7 consultation process as secret and closed to the public. *See* 50 C.F.R. § 402.14(g) (describing NMFS/FWS refusal to open the process to citizens). In the two pending plan consultations, the contract holders are excluded from the process, even though their contract rights are at stake.[9] The process is so secretive that the contract holders are unable to find out what subjects are being discussed, what issues are being considered or, for that matter, when the process might end.

The timber sale contract holders -- and the forests themselves -- are thus left in a precarious position. Each contract is legally binding on the government, each contract has a fixed duration, and each contract has an intended benefit of preserving the ecological health of the forest. Yet the contract holders are denied the benefits of the timber promised in each contract, the forests are denied the protection and enhancement intended in each contract, and the contracts remain suspended, until some unknown time in the future when the plan consultations are completed and the current injunction may be lifted.

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[8] The Solicitor General's petition suggests the plan consultations may conclude in March 1995, some three months after the statutory deadline. Petition at 30 n.22.

[9] Some contract holders asked the Forest Service to allow them to participate in the plan consultations as "permit applicants" under 16 U.S.C. § 1536(b), but all these requests were denied.

REASONS FOR GRANTING THE PETITION

The decision below profoundly changes public land management throughout the west by (1) requiring automatic injunctions for procedural violations of the ESA without any showing of harm to wildlife, (2) judicially enforcing non-binding ESA regulations and (3) frustrating Congressional land management goals by burdening federal land management and wildlife agencies with repeated, protracted and unproductive consultations that do not protect wildlife.

A. The decision below reaffirms and expands errant Ninth Circuit law mandating automatic injunctions for procedural violations of the ESA, contrary to prior rulings of this Court.

This Court expressly rejected the Ninth Circuit's "automatic injunction" rule in environmental cases in *AMOCO Production Co. v. Gambell*, 480 U.S. 531 (1987). In *AMOCO*, the Court reversed the Ninth Circuit's presumption that a procedural violation of an environmental law automatically requires injunctive relief as "contrary to traditional equitable principles." *Id.* at 545. The Court observed that "the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect . . . ." *Id.* at 544.

Despite this Court's rejection of the doctrine, the Ninth Circuit has continued to apply the automatic injunction rule to procedural violations of the ESA. The decision below represents at least the fourth case since *AMOCO* where the Ninth Circuit has granted an automatic injunction based on a purely procedural violation of the ESA.

The Ninth Circuit's ESA automatic injunction rule first appeared in *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), where the court enjoined a project for failure to conduct section 7 consultation, with no showing that the procedural violation threatened any irreparable harm to the environment. The court ruled that "[g]iven a substantial procedural violation of the ESA in connection with a federal project, **the remedy must be an injunction of the project pending compliance with the ESA**." *Id.* at 764 (emphasis added).

The ruling was based on *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984). *Thomas*, 753 F.2d at 764 ("We see no reason that the same principle [as in *Save Our Ecosystems*] should not apply to procedural violations of the ESA.") In *AMOCO*, this Court cited *Save Our Ecosystems* as the source of the injunction rule it rejected in that case. *AMOCO*, 480 U.S. at 541.

Immediately after *AMOCO*, however, the Ninth Circuit reaffirmed the ESA automatic injunction rule notwithstanding this Court's explicit disapproval of the *Save Our Ecosystems* doctrine on which it was based. *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Indeed, the Ninth Circuit concluded that *AMOCO* "appears implicitly to affirm *Thomas*." *Id.* With no finding of irreparable harm, the court enjoined a project based on a purely procedural violation of the ESA. *Sierra Club v. Marsh*, 816 F.2d at 1383-84.

Thereafter the Ninth Circuit issued automatic injunctions for procedural ESA violations, with no finding of irreparable harm, in *Conner v. Burford*, 848 F.2d 1441, 1445 (9th Cir.

1988), in *Lane County Audubon Society v. Jamison*, 958 F.2d at 294 and, most recently, in this case. App. 14a-16a.

The decade since the first Ninth Circuit automatic ESA injunction case has seen a vast expansion of the doctrine by the Ninth Circuit, most noticeably in *Lane County Audubon* and the decision below.

Thomas and *Sierra Club* involved the failure to consult on a single project, and both cases enjoined the project, with no finding of harm to a protected species. *Conner* expanded the doctrine to automatically enjoin a series of related oil and gas leases due to incomplete consultation, with no finding of harm to a species.

Lane County substantially expanded the doctrine to automatically enjoin related **projects** due to lack of consultation on a governing management **plan**, with no finding of harm to a species. The decision below in this case further expanded the doctrine to automatically enjoin unrelated projects due to lack of consultation on a governing plan, with no finding of harm to a species, and where the only evidence was the Forest Service's finding that each enjoined project is "not likely to adversely affect" the species in question. App. 5a.

The effect of these decisions is to recreate under ESA the very same automatic injunction rule this Court rejected in *AMOCO*. As the district court stated below: "The Ninth Circuit has held that the traditional sliding scale test for preliminary injunctions, weighing harms against the likelihood of success on the merits, is inapplicable for injunctions sought under the ESA." App. 41a-42a.

The Phoenix-like reemergence of the Ninth Circuit automatic injunction rule is contrary to this Court's decision not only in *AMOCO* but also in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The latest incarnation of the rule implicates the very same legal error identified in both cases: it "focuse[s] on the statutory procedure rather than on the underlying substantive policy the process was designed to effect." *AMOCO*, 480 U.S. at 544; *Romero-Barcelo*, 456 U.S. at 314-15.

In this case the Forest Service determined that each enjoined project is "not likely to adversely affect" the protected salmon stocks. Pacific Rivers Council never challenged these findings, and the district court and court of appeals below accepted these findings. App. 5a.

Yet with no finding of irreparable harm to the salmon stocks, and no weighing of competing harms, the court below mandated an automatic injunction against all "may affect" projects, even though all the projects were judged "not likely to adversely affect" the salmon stocks.[10]

The court's refusal to balance the harms in this case -- its refusal to consider the actual effects of the injunction it granted -- is particularly short-sighted, and potentially destructive to the environment, in light of the expert testimony offered by Intervenors that the injunction itself threatens irreparable harm to the long-term ecological health of the forests that are the subject of the case. No principle of

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[10] The Forest Service had voluntarily suspended all pending projects that were judged "likely to adversely affect" the salmon stocks, and those were not at issue in the case. App. 4a-5a.

equity requires a court to blind itself to the results of its actions, absent the most compelling evidence that Congress intended such a self-destructive result.

The evidence of such irrational Congressional intent is lacking here. The only cited source for the Ninth Circuit rule is this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1977), which identifies neither Congressional intent to disregard the effects of injunctive relief for procedural violations of the ESA, nor intent to automatically remedy every procedural violation of the ESA with an injunction.

Hill did not address this question. That case involved a violation of the ESA's primary substantive policy direction to avoid jeopardy to protected species, since "it was conceded that completion of the dam would destroy the critical habitat of the snail darter." *AMOCO*, 480 U.S. at 543 n.9. This Court never ruled that a purely procedural violation of the ESA automatically demands an injunctive remedy even when there is no impact on a species. *AMOCO* and *Romero-Barcelo* seem to command the contrary result.

This court should issue the writ of certiorari in this case to give the Ninth Circuit's revived automatic injunction rule the interment it should have received after *AMOCO*.

B. The decision below judicially enforces NMFS/FWS consultation regulations that are not binding on the Forest Service or other federal agencies.

To compound the error of the automatic injunction issued by the court below, the injunction also enforced against the Forest Service the NMFS/FWS joint consultation regulations that are not binding on that agency.

While the ESA merely prescribes "consultation with . . . the Secretary" as a tool to help federal agencies avoid jeopardy to protected species, 16 U.S.C. § 1536(a)(2), the NMFS/FWS joint consultation regulations go far beyond the statute to define in great detail when consultation is required, what specific consultative steps are necessary, and how consultation is to occur. 50 C.F.R. Part 402. These regulations take up eleven full pages of the Code of Federal Regulations. *Id.*

Most significantly, the regulations purport to require federal agencies to consult with NMFS or FWS (or both) on any proposed action that "may affect" a protected species. 50 C.F.R. § 402.14(a). This consultation must be "formal," *id.*, unless NMFS or FWS officially concur that an action is "not likely to adversely affect" the protected species. 50 C.F.R. § 402.14(b). The "may affect" consultation standard has the effect of commanding consultation on many minor projects where there is no plausible risk of jeopardy to a protected species.

This Court had occasion to consider these same regulations in *Lujan v. Defenders of Wildlife*,-- U.S. --, 112 S. Ct. 2130 (1992), a case ultimately involving standing to sue. In that case the Solicitor General advised this Court that the NMFS/FWS consultation regulations are not binding on federal action agencies such as the Forest Service:

> When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies . . . . The Solicitor General, however, has repudiated that position here,

> and the agencies themselves apparently deny the Secretary's authority. . . .

112 S. Ct. at 2141.

For that reason, four members of this Court believed that a suit seeking to expand the joint regulations to require consultation on foreign projects was not likely to redress an agency's failure to consult on such a foreign project. *Id.* at 2140 (Opinion of Justice Scalia in which the Chief Justice, Justice White and Justice Thomas joined).

Contrary to the government's position in *Defenders of Wildlife*, the court below held the consultation regulations binding on the Forest Service:

> . . . the ESA and its implementing regulations require federal agencies ("action agencies") to consult with the appropriate federal fish and wildlife agency -- NMFS, in this case -- when their actions "may affect" an endangered or threatened species. *See* 50 C.F.R. § 402.14(a). . . .

App. 9a n.8. Having incorrectly held the consultation regulations binding on action agencies like the Forest Service, the court below then proceeded to judicially enforce against the Forest Service the "may affect" consultation requirement -- which only appears in the regulations -- by holding that consultation is required because "the LRMPs are actions that **'may affect'** the protected salmon," App. 12a (emphasis added), by enjoining "ongoing and announced activities that **may affect** the Snake River chinook," App. 14a, 15a (emphasis added), and by ruling that "[t]he Forest

Service **cannot go forward with these activities** without first complying with the consultation requirements of the ESA." App. 16a (emphasis added).[11]

Similar judicial enforcement of the "may affect" consultation regulation also occurred in the Ninth Circuit's earlier *Lane County Audubon* decision. *Lane County Audubon*, 958 F.2d at 294.

These rulings convert the "non-binding" NMFS/FWS consultation regulations into judicially enforceable mandates against the Forest Service and other federal agencies. Coupled with the Ninth Circuit automatic injunction rule, judicial enforcement of the consultation regulations deprives agencies of needed statutory discretion to comply with the ESA, allows the courts to exercise broad supervisory power over ESA compliance that was never intended by Congress, and gives a powerful tool to those private interests that desire to use litigation over agency procedures to delay and frustrate multiple-use land management in the west.

The net result of the decision below is to compel every federal agency to satisfy the most trivial detail of the non-binding consultation procedures, on pain of an automatic court injunction -- even where, as here, the action agency and the wildlife agency agree that the non-binding procedure mandated by the court is unnecessary, C.R. 86, Exhibit 7, and there is no proven link between the non-binding procedure and the substantive wildlife policy adopted by Congress.

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[11] The court also relied on the regulations' definition of "agency action" in determining that a land and resource management plan is an action requiring consultation. App. 10a.

This court should issue a writ of certiorari to review this errant decision enforcing these non-binding regulations.

C. The decision below frustrates Congressional land management goals by burdening public land management in the west with repeated, protracted and unproductive consultation procedures that will substantially interfere with multiple-use land management and will add no protection to wildlife.

Intervenors cannot overstate the actual impact of the decision below. By mandating a complete halt to all "may affect" projects on an entire national forest every time a locally-present species is added to the threatened and endangered list, the decision below is likely to frustrate every existing Congressional policy on land management in the west by creating an unending bureaucratic gridlock. The result will be to end multiple-use land management as it has been known.

The first element in this formula for bureaucratic paralysis is the intention of the wildlife agencies to accelerate the number of new species listings in the next few years. *See* "Democrats Get Snared By GOP Pact on List Of Endangered Species," Wall Street Journal, February 17, 1995, page A1 (agency agreement to propose 382 new species listings by 1996). Thus, in the near future it can be expected that several new species listings will occur each **month** in the western states.

The second element is the seemingly uncontrollable duration of ESA consultations. As noted above, most consultations take many months; some take as much as several years. Statutory deadlines are routinely ignored.

The third element is the mandated designation of critical habitat for a listed species, which typically occurs one to three years after a species is listed.[12] Once critical habitat is designated, a new round of ESA consultations occurs since the ESA's duty for federal agencies to avoid adverse modification to critical habitat is independent of their duty to avoid jeopardy to listed species. 16 U.S.C. § 1536(a)(2). Even if consultation on the newly-listed species has just been completed, an entirely new consultation must follow the same tortuous regulatory route once critical habitat for the species is designated.

The decision below adds the final element to this paralytic compound. If every new species listing on a national forest triggers an LRMP consultation, as the court below held, and if all projects that "may affect" the newly-listed species must be halted until the plan consultation is completed, as the court below also held, then land management agencies will never escape the continuous loop of consultation and injunction.

Since each plan consultation lasts months or years, and since once critical habitat is designated for the newly listed species, the whole consultation procedure must repeat itself -- no doubt, as species advocates are sure to argue, with another automatic halt in ongoing projects, and since the entire multi-step process must be repeated again for each of the hundreds of species waiting to be listed, it is doubtful that any multiple-use resource plan for an area of public land in the west will ever again be implemented.

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[12] *See* 16 U.S.C. § 1533; *Northern Spotted Owl v. Lujan*, 758 F. Supp. 761 (W.D. Wash. 1991).

Yet Congress has mandated that the national forests (and most Bureau of Land Management ("BLM") lands) are to be managed for the multiple use and sustained yield of resources including timber, grazing, mining and other commodities. 16 U.S.C. § 528, § 1604(e) (national forests); 43 U.S.C. § 1701(a)(7), § 1702(c) (BLM lands). Nothing in the ESA repealed these laws. Nonetheless, the decision below is likely in practice to end multiple-use sustained-yield management of public lands as Congress intended it, at least in the western states that are subject to the jurisdiction of the Ninth Circuit.

Such a clear frustration of the Congressional intent expressed in the land management laws would require unequivocal legislative endorsement even if it could be shown that this result is unavoidable in order to further the substantive wildlife protection goals of the ESA. This frustration of Congressional intent is plainly contrary to law where, as here, no legislative endorsement exists, no impact on species has been shown and the expert land management agency and the expert wildlife agency agree that the court-ordered consultation is unnecessary and unproductive. C.R. 86, Exhibit 7.

To avoid this unacceptable frustration of Congressional land management policies, this Court should issue a writ of certiorari to review the decision below.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Dated this 24th day of February, 1995.

Respectfully submitted,

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